

1 THE HONORABLE RICHARD A. JONES
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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
10 AT SEATTLE

11 MINHNGA NGUYEN,

12 Plaintiff,

13 v.

14 THE BOEING COMPANY,

15 Defendant.

16 Case No. C15-00793-RAJ

17 **ORDER**

18 This matter comes before the Court on Defendant's Motion for Summary
19 Judgment. Dkt. # 100. Plaintiff opposes the Motion. Dkt. # 102. For the reasons that
20 follow, the Court **DENIES** Defendant's Motion. Dkt. # 100.

21 **I. BACKGROUND**

22 Plaintiff Minhnga Nguyen is a Vietnamese woman and a resident of the State of
23 Washington. Dkt. # 104 ¶¶ 1, 3. Plaintiff was hired by Defendant, the Boeing
24 Company ("Boeing), in 1991. *Id.* at ¶ 3. Nguyen worked at Boeing as an Electrical
25 Engineer until she was laid off from her job in 2009. *Id.* at ¶¶ 3-5. From April 26,
26 2010 through December of 2011, Nguyen worked for Boeing as a Contract Engineer.
Id. at ¶ 6. In 2011, Boeing hired Nguyen back as a Level 3 System Engineer. *Id.* at ¶
7.

1 Pursuant to Boeing's Administration of Employee Corrective Action Policy, an
2 Employee Corrective Action ("ECA") will be taken when an employee engages in a
3 practice that is inconsistent with the Boeing Code of Conduct, Expected Behaviors for
4 Boeing Employees, U.S. Government security, regulatory and contractual
5 requirements, or ordinary, reasonable, common sense rules of conduct. Dkt. # 101-1 at
6 68-76. When an employee has an active corrective action on file, it is typically
7 handled using progressive corrective action. *Id.* The corrective action process does
8 not necessarily include every step, and can begin with any level and proceed to more
9 severe measures for similar subsequent violations. *Id.* After an investigation and
10 review, an ECA is issued at one of the following escalating levels: (1) verbal warning;
11 (2) written warning; (3) time off from work; and (4) discharge. *Id.* Written warnings,
12 time off from work, and discharge require preparation and issuance of a Corrective
13 Action Memo ("CAM"). *Id.* After the ECA is issued, employee behavior is routinely
14 monitored for compliance. *Id.* If a CAM is in active status, it must be the basis for
15 progressive corrective action if the employee engages in behavior that is the same or
16 similar to the behavior in the active CAM. *Id.* The standard duration of an active
17 CAM is twelve (12) months unless additional violations for the same or similar type of
18 offense have occurred. *Id.* If such an additional violation occurs, the previous active
19 CAM's expiration date will be extended to match that of the subsequent CAM. *Id.*

20 On March 14, 2014, Plaintiff received a CAM from her supervisor at the time,
21 Dorothy Todd, for failure to comply with management direction. Dkt. # 103 Ex. A.
22 Prior to that date, Plaintiff alleges that she complained about Todd not treating her
23 equally to other employees. Dkt. # 104 ¶ 9. Plaintiff responded to this CAM and
24 stated that her supervisor, Dorothy Todd, and James Michael Todd were retaliating
25 against her for reporting James Michael Todd's actions. Dkt. # 103 Ex. A. It is
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1 unclear what these actions were, or why Todd and James Michael Todd would be
2 retaliating against Plaintiff for reporting them. *Id.*

3 In April of 2014, Todd was transferred to a different group and Gary Weber
4 became Plaintiff's supervisor. Dkt. # 104 ¶ 12. Keith Sellers became Plaintiff's senior
5 manager, and Kim Conner became her Human Resources generalist. *Id.* at ¶ 13. In
6 August of 2014, Plaintiff received a second CAM for failing to comply with
7 management direction. The CAM states that Plaintiff failed to notify management that
8 she was out of the office on July 21, 2014 and that she failed to report her time
9 accurately. Dkt. # 103 Ex. B.

10 Plaintiff's manager, Weber, was on vacation at that time, and Plaintiff alleges
11 that she sent her acting manager, Jeff Vick, an email on July 18, 2014, informing him
12 that she was ill and that she would be absent the following Monday. Dkt. # 104 ¶ 16.
13 On July 21, 2014, Sellers called Plaintiff's home twice, but Plaintiff did not answer his
14 calls. *Id.* Sellers directed Plaintiff to change her time entry for July 21, 2014 to time
15 off without pay, but Plaintiff did not do so. Dkt. # 101-1. The parties disagree on
16 whether Vick or Sellers was Plaintiff's acting manager while Weber was on vacation.
17 Dkt. ## 100, 104. Plaintiff received time off from work without pay for this CAM.
18 Dkt. # 103 Ex. B. The Expected Behavior Category Violation ("EBCV") for both the
19 March 2014 and August 2014 CAMs was "Produce, design, and support our products
20 and services". Dkt. # 103 Exs. A, B. On August 15, 2014, Plaintiff contacted Director
21 of Engineering, Rich Horigan, complained about her suspension, and asked him for
22 assistance. Dkt. # 104 ¶ 21.

23 On September 9, 2014, Plaintiff received a parking ticket and her car was
24 towed. Dkt. # 101-1. On October 14, 2014, Plaintiff received a third CAM for failing
25 to comply with site parking regulations. The EBCV for this CAM was "Adhere to
26 company agreements, policies, and procedures". Dkt. # 101-1 at 81. On October 17,

1 2014, Plaintiff filed a discrimination complaint with Boeing’s EEO department. Dkt.
2 # 104 ¶ 24. Plaintiff requested Human Resources Manager Heather Frasier’s help
3 filing the complaint. *Id*; Dkt. # 101 Ex. 3. On that same day, Weber emailed Kim
4 Conner asking to meet to “talk over an employee issue and how to move forward.”
5 Dkt. # 103 Ex. D.

6 On October 20, 2014, Conner sent herself two emails detailing her meeting with
7 Weber. *Id*. The emails state that Weber’s concern “is regarding Mihngna Nguyen
8 [sic] and her continuing to fail to follow directions.” The emails also state that
9 Plaintiff “continues to do some work that takes a significant amount of time away from
10 the expected work packages,” that Plaintiff would not use a common spreadsheet to
11 log information despite being asked to do so, that there were “other issues”, and that
12 Weber had given her “sufficient time and repeated requests to comply with the
13 direction, but she fails to do as requested.” *Id*. The emails also note that Conner
14 informed Frasier, since Frasier received emails from Plaintiff on “01/16/2014 [sic] and
15 01/17/2014 [sic] . . . regarding the corrective action she has received and feeling
16 singled out,” and that Weber stated that Plaintiff was not being singled out. *Id*.

17 On or about October 27, 2014, Conner met with Plaintiff to discuss the issues
18 raised by Weber. Dkt. # 101 Ex. 3. Conner followed up with Plaintiff in writing,
19 asking for her view of the situation. Dkt. # 101-1 at 79-80. The email detailed four
20 examples of situations where Weber asked Plaintiff to do something, and Plaintiff did
21 not follow his directions. *Id*. Plaintiff responded to Conner’s email and Conner then
22 reviewed Plaintiff’s response with Weber. Dkt. # 101 Ex. 3. In Plaintiff’s response,
23 she indicated that felt she was being treated differently than other employees in the
24 same group, and that she was concerned that Conner and Weber were working
25 together to give her CAMs and suspensions, and that she was being targeted for
26 termination. Dkt. # 101-1 at 79-80. After reviewing Plaintiff’s responses, Weber

1 made the decision to discharge Plaintiff. Conner testified that decision to terminate
2 Plaintiff was made on or around October 28 or 29, 2014. *Id.*

3 On November 4, 2014, Frasier submitted Plaintiff's complaint to David Wuerch
4 in Boeing's EEO department. Dkt. # 101 Ex. 4. Wuerch and Frasier exchanged
5 emails regarding the content of the complaint and Frasier indicated that she met with
6 Plaintiff in order to "try to understand the basis of her complaint," and noted that
7 Plaintiff incorporated some additional information. Dkt. # 101 Ex. 3. On November
8 13, 2014, Wuerch wrote to Frasier that he did not see any "EEO issues" and that they
9 could proceed with Plaintiff's termination. *Id.*

10 On November 20, 2014, Sellers informed Plaintiff that she was being issued
11 two additional CAMs. Dkt. # 101 Ex. 5; Dkt. # 104. The first was issued because
12 Plaintiff received another parking violation. The EBCV for this CAM was "Adhere to
13 company agreements, policies and procedures. Dkt. # 101-1 at 82. The second was
14 issued for failure to comply with management direction. Specifically, for Plaintiff's
15 failure to obtain manager approval to flex her schedule, failure to stop doing a specific
16 process and derivative work statement when requested by her manager, and failure to
17 start using a common process when requested by her manager. Dkt. # 101-1 at 83.
18 The EBCV for this CAM was "Produce, design, and support our products and
19 services." This was Plaintiff's third CAM issued for this EBCV. *Id.* Sellers then
20 informed Plaintiff that he was terminating her employment with Boeing for failure to
21 follow employer directives. Dkt. # 104.

22 Plaintiff filed a Complaint against Boeing on May 20, 2015. Plaintiff alleged
23 harassment and discrimination based on her race, national origin, and sex, and
24 termination in retaliation for complaining about the alleged harassment and
25 discrimination. Dkt. # 1. Plaintiff has since amended her complaint three times in
26 response to three motions to dismiss. Dkt. ## 25, 29, 43. On December 20, 2016, the

1 Court granted Defendant's motion to dismiss with respect to all claims except for her
2 retaliation claim. Dkt. # 46.

3 **II. LEGAL STANDARD**

4 Summary judgment is appropriate if there is no genuine dispute as to any
5 material fact and the moving party is entitled to judgment as a matter of law. Fed. R.
6 Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence
7 of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).
8 Where the moving party will have the burden of proof at trial, it must affirmatively
9 demonstrate that no reasonable trier of fact could find other than for the moving party.
10 *Soremekun v. Thrifty Payless, Inc.*, 509 F.3d 978, 984 (9th Cir. 2007). On an issue
11 where the nonmoving party will bear the burden of proof at trial, the moving party can
12 prevail merely by pointing out to the district court that there is an absence of evidence
13 to support the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the
14 moving party meets the initial burden, the opposing party must set forth specific facts
15 showing that there is a genuine issue of fact for trial in order to defeat the motion.
16 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986). The court must view the
17 evidence in the light most favorable to the nonmoving party and draw all reasonable
18 inferences in that party's favor. *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133,
19 150-51 (2000).

20 However, the court need not, and will not, "scour the record in search of a
21 genuine issue of triable fact." *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996);
22 *see also, White v. McDonnel-Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the
23 court need not "speculate on which portion of the record the nonmoving party relies,
24 nor is it obliged to wade through and search the entire record for some specific facts
25 that might support the nonmoving party's claim"). The opposing party must present
26 significant and probative evidence to support its claim or defense. *Intel Corp. v.*

Hartford Accident & Indem. Co., 952 F.2d 1551, 1558 (9th Cir. 1991).

Uncorroborated allegations and “self-serving testimony” will not create a genuine issue of material fact. *Villiarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1061 (9th Cir. 2002); *T.W. Elec. Serv. V. Pac Elec. Contractors Ass’n*, 809 F. 2d 626, 630 (9th Cir. 1987).

III. DISCUSSION

The Court analyzes Plaintiff's state and federal retaliation claims under the same framework. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061, 1065-1066 (9th Cir. 2003) (finding that Washington courts look to federal law when analyzing retaliation claims, and utilizing the three-part burden shifting test described in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973)). To establish a prima facie case of retaliation, a plaintiff must demonstrate that (1) she engaged in a statutorily protected activity, (2) defendant took some adverse employment action against her, and (3) there is a causal connection between the protected activity and the adverse employment action. *Id.* at 1065-1066; *Corville v. Cobarc Servs., Inc.*, 869 P.2d 1103, 1105 (Wash. Ct. App. 1994). If a plaintiff establishes a prima facie case, the evidentiary burden shifts to the employer to produce admissible evidence of a legitimate, nondiscriminatory reason for the discharge. *Stegall*, 350 F.3d at 1066; *Hollenback v. Shriners Hospitals for Children*, 206 P.3d 337, 344 (Wash. Ct. App. 2009). If the employer meets its burden, the presumption is removed and the employee must then establish a genuine issue of material fact as to pretext. *Stegall*, 350 F.3d at 1066; *Hollenback*, 206 P.3d at 344.

A. Prima Facie Case

The parties do not dispute whether Plaintiff engaged in a statutorily protected activity when she filed her EEO complaint in October of 2014 and that her termination in November of 2014 was an adverse employment action. Boeing argues that Plaintiff

1 cannot establish a *prima facie* case of retaliation because she cannot establish a causal
2 connection between her protected activity and the adverse employment action.
3 Plaintiff argues that Weber's knowledge of the complaint, and the proximity in time
4 between Plaintiff's complaint and her termination, are sufficient circumstantial
5 evidence to establish the causal link between her protected activity and the alleged
6 retaliatory action. Dkt. # 102. To establish causation, Plaintiff must show by a
7 preponderance of the evidence that filing the complaint was one of the reasons she was
8 terminated and that but for the complaint, she would not have been fired. *See*
9 *Villiarimo*, 281 F.3d at 1064–65. “[I]n some cases, causation can be inferred from
10 timing alone where an adverse employment action follows on the heels of protected
11 activity.” *Id.*

12 First, it is unclear when exactly the decision to terminate Plaintiff was made.
13 Conner testified that the decision to terminate Plaintiff was made on October 28 or 29,
14 2014. Dkt. # 101 Ex. 3. Weber testified that the decision to terminate Plaintiff was
15 made before he left on vacation. Dkt. # 101 Ex. 2. He notified Conner that he
16 intended to terminate Plaintiff and that Conner told him that they needed to wait until
17 Plaintiff's EEO complaint was investigated. Weber estimated that this conversation
18 took place somewhere between November 10th and 17th. *Id.* Weber also stated that
19 the actual decision to terminate was made prior to his conversation with Conner about
20 when the termination should actually occur. Dkt. # 107 Ex. 2. Weber, the person who
21 made the decision to terminate Plaintiff, did not give an exact date or time frame as to
22 when this decision was made. *Id.*

23 Second, there is an issue of fact as to when the appropriate decisionmaker had
24 knowledge of Plaintiff's complaint. Boeing contends that the decision to terminate
25 Plaintiff was made before Conner and Weber learned that she had filed an EEO
26 complaint. After Weber made the decision to terminate Plaintiff's employment,

1 Conner alleges that she spoke to her manager, Frasier, about the termination and it was
2 only then that she and Weber learned of the complaint. Dkt. # 101 Exs. 2, 3. Plaintiff
3 points to the October 20, 2014 emails Conner sent to herself as evidence that Weber
4 and Conner knew about Plaintiff's complaint prior to the decision to terminate. While
5 these emails do not provide definitive proof that Conner knew Plaintiff filed an EEO
6 complaint, they do indicate that Conner and Frasier were in communication regarding
7 Weber's conversation with Conner about his issues with Plaintiff, and that Conner
8 knew that Frasier had received emails from Plaintiff regarding her CAM and her
9 concerns that she was being treated differently from other employees.

10 Plaintiff first sent her complaint by email to Frasier on October 16, 2014. Dkt.
11 # 101 Ex. 3. Frasier responded and indicated that the complaint form was incomplete.
12 On October 17, 2014, Plaintiff emailed an updated form to Frasier in response to her
13 feedback. *Id.* Conner's October 20, 2014 emails indicate that Conner was aware that
14 Frasier received emails from Plaintiff on "01/16/2014 [sic] and 01/17/2014 [sic] . . .
15 regarding the corrective action she has received and feeling singled out," and that
16 Weber stated that Plaintiff was not being singled out. Dkt. # 103 Ex. D. While
17 Plaintiff provides no other evidence that Weber's decision to terminate her
18 employment was motivated by her EEO complaint, it is not clear from the evidence on
19 the record that Plaintiff would have been terminated regardless of her protected
20 activity. Plaintiff received her final two CAMs on the day she was terminated and
21 after the decision to terminate her was made. It is unclear which of these two CAMs
22 provided the impetus for her termination. Weber and Conner indicate that the decision
23 to terminate Plaintiff occurred prior to the issuance of her last two CAMs. However,
24 Frasier's correspondence with Wurech on November 10, 2014 notes that Plaintiff had
25 "received another parking ticket, which in the progressive part of our corrective action
26 process should result in termination. HRG Kim Conner has been working with our

1 Employee Relation group to determine appropriate go forward timing.” Dkt. # 101
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3 Ex. 3.

4 “Causation sufficient to establish the third element of the prima facie case may
5 be inferred from circumstantial evidence, such as the employer's knowledge that the
6 plaintiff engaged in protected activities and the proximity in time between the
7 protected action and the allegedly retaliatory employment decision.” *Yartzoff v.*
8 *Thomas*, 809 F.2d 1371, 1376 (9th Cir. 1987). Here, where Plaintiff's termination
9 occurred about one month after she filed her complaint, and where there is an issue of
10 fact as to whether Weber had knowledge of that complaint, the closeness of time
11 between the two events is sufficient to support a possible inference of causation.

12 B. Legitimate, Nondiscriminatory Reason

13 The Court finds that Boeing has met its burden to produce admissible evidence
14 of a legitimate, nondiscriminatory reason for Plaintiff's discharge. At the time of her
15 termination, Plaintiff had five CAMs: three CAMs under the EBCV “Produce, design,
16 and support our products and services,” and two CAMs under the EBCV “Adhere to
17 company agreements, policies and procedures. In all five of these situations, Plaintiff
18 displayed a failure to comply with management direction or company policy. Other
19 than the circumstances leading to her second CAM due to her absence from work,
20 Plaintiff does not dispute the facts underlying her CAMs or that she failed to comply
21 with management directives or company policy. Plaintiff only argues that Boeing
22 policy was implemented differently as applied to her in particular.

23 At least three of Plaintiff's CAMs were in the same EBCV which is grounds for
24 progressive corrective action. As noted in Boeing's Employee Corrective Action
25 Policy, the corrective action process does not necessarily include every step, and can
26 begin with any level. Boeing was not required to issue Plaintiff a verbal warning prior
to her written warnings, and was not, as argued by Plaintiff, required to wait for

1 Plaintiff to commit four infractions in the same category prior to discharge. Dkt. #
2 101-1 at 68-76. As Boeing has met its burden to establish a legitimate,
3 nondiscriminatory reason for Plaintiff's discharge, the Court will now consider
4 whether there is a genuine issue of material fact as to pretext.

5 **C. Pretext**

6 At issue is whether, viewing the evidence in the light most favorable to
7 Plaintiff, Plaintiff has raised a genuine issue of material fact as to whether Boeing's
8 legitimate nondiscriminatory reason for Plaintiff's termination is pretextual. “[A]
9 plaintiff can prove pretext in two ways: (1) indirectly, by showing that the employer's
10 proffered explanation is ‘unworthy of credence’ because it is internally inconsistent or
11 otherwise not believable, or (2) directly, by showing that unlawful discrimination more
12 likely motivated the employer.” *Chuang v. Univ. of California Davis, Bd. of Trustees*,
13 225 F.3d 1115, 1127 (9th Cir. 2000) (citing *Godwin v. Hunt Wesson, Inc.*, 150 F.3d
14 1217, 1220-22 (9th Cir. 1998)). In some cases, a combination of indirect and direct
15 evidence can establish pretext so as to make summary judgment improper. *Id.*

16 As noted above, there is an issue of fact as to the circumstances surrounding
17 Plaintiff's termination, both as to when the decision to terminate her occurred and the
18 exact reasoning behind that decision. There is also an issue of fact as to whether the
19 people making the decision to terminate her had knowledge of her protected activity
20 when the decision was made. Plaintiff also argues that the closeness in time between
21 her EEO complaint and her termination is evidence of pretext. Plaintiff worked for
22 Boeing for twenty-one years, yet her presumably her disciplinary issues did not begin
23 until 2014. According to the evidence presented by the parties, Plaintiff was
24 terminated only eight months after her first CAM and just one month after she engaged
25 in protected activity. This temporal proximity as proof of a causal link between
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1 Plaintiff's complaint and her termination, is relevant to an evaluation of pretext. *See*
2 *Reynaga v. Roseburg Forest Prod.*, 847 F.3d 678, 694 (9th Cir. 2017).

3 In some cases, "the fact that persons outside the plaintiff's protected class were
4 treated better for offenses of comparable seriousness could also help demonstrate
5 pretext." *Id.* Defendant provides no evidence to rebut Plaintiff's allegations that she
6 was being treated differently than other employees with regards to several of the
7 infractions that led to the issuance of her CAMs, namely, with regards to enforcement
8 of parking violations, the handling of her absence on July 21, 2014, and whether she
9 was allowed to flex her schedule. The temporal proximity between Plaintiff's
10 protected activity and her termination, the question of whether Plaintiff's supervisors
11 had knowledge of her complaint when they made the decision to terminate her, the
12 issues of fact regarding the circumstances under which the decision was made, and
13 Plaintiff's allegations that she was being treated differently than other employees in
14 her group, are sufficient to establish a genuine issue of material fact as to whether
15 Boeing's proffered reason for terminating Plaintiff's employment was pretextual.
16 Therefore, summary judgment of Plaintiff's retaliation claim would be inappropriate
17 and Defendant's Motion for Summary Judgment is **DENIED**. Dkt. # 100.

18 **IV. CONCLUSION**

19 For all the foregoing reasons, the Court **DENIES** Defendant's Motion for
20 Summary Judgment. Dkt. # 100.

22 Dated this 30th day of March, 2018.

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The Honorable Richard A. Jones
United States District Judge